

***NOTE: This language parallels the federal law. However, instead of "at the time of death," should the language be "immediately before death," as in s. 867.035 (1) (a) (intro.)?

- 1 2. Notwithstanding subd. 1., "property of a decedent recipient" includes any
2 property owned by the recipient or the recipient's spouse at the recipient's
3 death in which the recipient had an marital interest, within 5 years before the date on
4 which the recipient applied for public assistance, with the spouse to whom the
5 recipient was married on the date on which the recipient applied for public
6 assistance.

***NOTE: Does this work for both decedents, even if the surviving spouse was not the same spouse as the one on the date on which the recipient applied for public assistance?

- 6 (e) "Public assistance" means any services provided as a benefit under a
7 long-term care program, as defined in s. 49.496 (1) (bk), medical assistance under
8 subch. IV, long-term community support services funded under s. 46.27 (7), or aid
9 under s. 49.68, 49.683, or 49.685.
10 (f) "Recipient" means a person who received public assistance.

***NOTE: Section 867.035 is renumbered into this new section.

- 11 (2) RECOVERABLE AMOUNTS. (c) There is a presumption, which may be rebutted
12 by clear and convincing evidence, that all property of the deceased nonrecipient
13 surviving spouse was marital property held with the recipient and that 100 percent
14 of the property of the deceased nonrecipient surviving spouse is subject to the
15 department's claim under par. (a).

- 16 ~~(2m) LIMITING FINANCIAL RESPONSIBILITY OF SPOUSE'S PROPERTY. No later than 6~~
17 ~~months after the death of a recipient, the nonrecipient surviving spouse may file a~~
18 ~~petition with the department to limit the financial responsibility of the property of~~
19 ~~the nonrecipient surviving spouse. The financial responsibility of the property of the~~
20 ~~nonrecipient surviving spouse may not exceed the value of the property of the~~
21 ~~nonrecipient surviving spouse as of the date of death of the recipient.~~

Comment [RLK33]: Either it should say immediately before death or, if it is desired to keep the federal definition intact, "time of death" should be defined using something similar to Oregon, e.g. for purposes of this section "in no case shall the time of death be construed to mean a time after which an interest in real or personal property or other assets may 1) Pass by survivorship or other operation of law due to the death of the decedent; OR 2) Terminate by reason of the decedent's death. Ohio has time of death defined in its estate recovery statutes in a very similar manner in ORC 5111.11 (A) (6). It appears other states found value in defining the time of death for recovery purposes.

Comment [RLK34]: See comment [RLK20] - is this language broad enough?

Comment [RLK35]: Divorce and remarriage after application and during eligibility has occurred. In those situations, the recipient is retested for eligibility and the new spouse's income and assets are included. Would it help to add something like "and/or with the spouse to whom the recipient was married on the date that eligibility for medical assistance was redetermined, if that spouse is different from the spouse married to the recipient at the time of application". Alternatively, since this is somewhat of a rare occurrence, we could just leave it as is.

NOTE: See ***NOTE after proposed s. 49.489 (3m)

Comment [RLK36]: Language removed - see
Comment [RLK11]

(3) TRANSMITTAL OF PROPERTY UPON RECEIPT OF AFFIDAVIT. (a) Any property of a

decedent that is transferred by a person who has possession of the property at the time of the decedent's death is subject to the right of the department to recover the amounts specified in sub. (2) (a). Upon request, the person who transferred the property shall provide to the department information about the property of the decedent that the person has transferred and information about the persons to whom the property was transferred.

(c) An affidavit under this subsection shall contain all of the following information:

1. That the department has a claim against the property that it intends to recover from the property.

2. The amount of and basis for the claim.

3. That the person has a right to an administrative hearing on the extent and fair market value of the decedent's interest in the property ~~that is not being transferred under s. 867.03 or through administration of the decedent's estate under s. 866.07 or ch. 865.~~

4. How to request an administrative hearing under subd. 3.

5. That the person may request from the department a hardship waiver, if the person co-owned the property with the decedent or is a beneficiary of the property.

6. How to request a hardship waiver under subd. 5.

(d) ~~Any person to whom the property of a decedent has been transferred or sold may voluntarily pay off, settle, or otherwise satisfy the department's claim. Any such~~

~~payments are voluntary repayments of past public assistance payments for the~~

~~benefit of the deceased recipient and do not constitute a prohibited adjustment or~~

Comment [RLK37]: Affidavits in general - We will be using the affidavit process in two situations. We will be sending our affidavits to individuals that are transferring solely owned property of the decedent via s. 867.03. These individuals have the opportunity to challenge our claim, etc. by requesting estate administration through the courts. We will also be sending affidavits and placing liens on non-probate property. Individuals receiving non-probate assets will not have opportunity to request probate administration to challenge the extent of the Department's claim, so we need to give them hearing rights. The issues subject to fair hearing would be the extent of the decedent's interest in the non-probate property and the value of the property. So some type of hearing rights need to be included in s. 49.489.

Comment [RLK38]: This language is from s. 867.03(2)(g). Also see Comment [RLK37].

→
? 49.849?
example?

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PJK&TJD:jd:rs
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23 _____ recovery.



~~---NOTE: This is the language requested. Are the prohibited arguments or recovery under federal law?~~

~~Comment: [REDACTED] Language removed~~

1 (4) RECOVERY AGAINST REAL PROPERTY. (c) Except as provided in pars. (a) and
2 (b), if the conditions in sub. (2) (a) 1. and 2. are satisfied, the department may recover
3 the amount, or any portion of the amount, that it may recover under sub. (2) (a) from
4 any property of the decedent that is real property in the manner provided in s. 49.848
5 (4) (c) 3. or (5).

6 (4m) ALLOWABLE COSTS OF SALE OF REAL PROPERTY. (a) Subject to par. (b), if
any real property of a
7 decedent has been sold after the death of the decedent, only the following reasonable
8 expenses, if any, incurred in preserving or disposing of the real property may be
deducted

9 from the sale proceeds that the department may recover:

10 1. Closing costs of sale, including reasonable attorney fees of the seller, the cost
11 of title insurance, and recording costs.

12 2. ~~Costs of summary procedures under ch. 867.~~

13 3. ~~An incentive allowance.~~

----NOTE: What is this?

14 24. Property insurance premiums.

15 35. Property taxes due.

16 46. Utility costs necessary to preserve the property.

17 7. ~~Other costs incurred under a written property management agreement with~~
18 ~~the department.~~

19 58. Expenses incurred in providing necessary maintenance or making necessary
20 repairs, without which the salability of the property would be substantially
21 impaired.

22 (b) Any expense under par. (a) may be deducted from the sale proceeds only if
23 it is documented and approved by the department, ~~it was paid after the recipient~~
~~entered a nursing facility, and, if the~~

1 property is real property, it was not incurred while any other individual was living
2 on the property.

---NOTE: In course of the context of this provision, what property and what side
is being referred to, and who is selling the property? Is "nursing facility" the term you
want to use?

✓
Comment [PJK&TJD]: This should be used
primarily for jointly held real property.

3 (5c) VALUE OF DECEDENT'S INTEREST. For purposes of determining the value of
4 the decedent's interest in property of the decedent, all of the following apply:

5 (a) If the decedent held title to real property jointly with one or more persons
6 other than his or her spouse, the decedent's interest in the real property is equal to
7 the fractional interest that the decedent would have had in the property if the
8 property had been held with the other owner or owners as tenants in common.

9 (b) If the decedent held title to personal property jointly with one or more
10 persons other than his or her spouse, the decedent's interest in the personal property
11 is equal to either of the following:

12 1. The percentage interest that was attributed to the decedent when his or her
13 eligibility for public assistance was determined.

14 2. If the percentage interest was not determined as provided in subd. 1., the
15 fractional interest that the decedent would have had in the property if the property
16 had been held with the other co-owner or co-owners as tenants in common.

17 (c) If the decedent held a life estate in real property, the decedent's interest is
18 equal to the decedent's percentage of life tenant ownership based on the decedent's
age on the

19 date of death and calculated using the fair market value of the property and life
20 estate-remainderman tables used by the department to value life estates for
21 purposes of determining eligibility for Medical Assistance.

---NOTE: I used the language supplied to me in the drafting instructions. Does this
work for your purposes? To what does "percentage of ownership" refer, ownership in the
life estate or the property? Do you mean that, to determine the value of a life estate, you

calculate a percentage of ownership in the property by using age, fair market value, and tables?

✓
Comment [RLK41]: Yes, we would calculate the value in the same fashion done for Medicaid eligibility.

1 (d) A property's fair market value is the price that a willing buyer would pay
2 a willing seller for the purchase of the property. The burden of proof for establishing
3 a property's fair market value is on the surviving owners or beneficiaries, or their
4 representatives. Fair market value must be established through a credible
5 methodology, which may include an appraisal performed by a licensed appraiser.

....NOTE: The following two subsections are alternative procedures. The first is the same as the procedure under s. 49.497 (1m). The second is the warrant procedure under s. 49.195 (3m). Which do you prefer?

✓
Comment [RLK42]: We prefer (5m). Also, the new provision s. 49.849(5m) should be referenced in s. 49.85, which allows the Department to certify certain past due collections to the Department of Revenue for tax refund intercepts. We would want to do the same for estate recovery.

6 (5m) ACTION OR ORDER TO ENFORCE RECOVERY. (a) If, after receipt of an affidavit
7 under sub. (3), a person who possesses property of a decedent fails to transmit the
8 property to the department, the department may bring an action to enforce its right
9 to collect amounts specified in sub. (2) (a) from the property or may issue an order
10 to compel transmittal of the property. Any person aggrieved by an order issued by
11 the department under this paragraph may appeal the order as a contested case under
12 ch. 227 by filing with the department a request for a hearing within 30 days after the
13 date of the order. The only issue at the hearing shall be the determination by the
14 department that the person has not transmitted the property to the department.

15 (b) If any person named in an order to compel transmittal of property issued
16 under par. (a) fails to transmit the property under the terms of the order and no
17 contested case to review the order is pending and the time for filing for a contested
18 case review has expired, the department may present a certified copy of the order to
19 the circuit court for any county. The sworn statement of the secretary shall be
20 evidence of the department's right to collect amounts specified in sub. (2) (a) from the
21 property and of the person's failure to transmit the property to the department. The
22 circuit court shall, without notice, render judgment in accordance with the order. A

1 judgment rendered under this paragraph shall have the same effect and shall be
2 entered in the judgment and lien docket and may be enforced in the same manner
3 as if the judgment had been rendered in an action tried and determined by the circuit
4 court.

5 (c) The recovery procedure under this subsection is in addition to any other
6 recovery procedure authorized by law.

7 ~~(5r) WARRANT FOR RECOVERY. (a) 1. If any person who possesses property of a~~
8 ~~decedent fails to pay to the department the amount that it may recover under~~
9 ~~sub.~~

10 ~~(2) (a), up to the value of the property that the person possesses, the department~~
11 ~~may~~

12 ~~issue a warrant directed to the clerk of circuit court of any county.~~

13 ~~2. The clerk of circuit court shall enter in the judgment and lien docket the~~
14 ~~name of the person mentioned in the warrant, the amount for which the~~
15 ~~warrant is~~

16 ~~issued, and the date on which the clerk entered that information.~~

17 ~~3. A warrant entered under subd. 2. shall be considered in all respects as a final~~
18 ~~judgment constituting a perfected lien upon the person's right, title, and~~
19 ~~interest in~~

20 ~~all real and personal property located in the county in which the warrant is~~
21 ~~entered.~~

22 ~~4. After issuing a warrant, the department may file an execution with the clerk~~
23 ~~of circuit court for filing with the sheriff of the county, commanding the sheriff to~~
24 ~~levy~~

25 ~~upon and sell sufficient real and personal property of the person to pay the~~
26 ~~amount~~

27 ~~stated in the warrant in the same manner as upon an execution against~~
28 ~~property~~

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- 21 ~~issued upon the judgment of a court of record, and to return the warrant to~~
the
- 22 ~~department and pay to it the money collected by virtue of the warrant within 90~~
days
- 23 ~~after receipt of the warrant. The execution may not command the sheriff to levy~~
upon
- 24 ~~or sell any property that is exempt from execution under ss. 815.18 (3) and~~
815.20.

1 ~~(b) The clerk of circuit court shall accept, file, and enter each warrant under~~
2 ~~par. (a) and each satisfaction, release, or withdrawal under par. (d), (e), (g), or~~
3 ~~(h) in~~
4 ~~the judgment and lien docket without prepayment of any fee, but the clerk of~~
5 ~~circuit~~
6 ~~court shall submit a statement of the proper fee semiannually to the~~
7 ~~department~~
8 ~~covering the periods from January 1 to June 30 and July 1 to December 31~~
9 ~~unless a~~
10 ~~different billing period is agreed to between the clerk of circuit court and~~
11 ~~the~~
12 ~~department. The department shall pay the fees, but shall add the fees~~
13 ~~provided by~~
14 ~~s. 814.61 (5) for entering the warrants to the amount of the warrant and shall~~
15 ~~collect~~
16 ~~the fees from the person named in the warrant when satisfaction or~~
17 ~~release is~~
18 ~~presented for entry.~~
19 ~~(c) If a warrant that is not satisfied in full is returned, the department may~~
20 ~~enforce the amount due as if the department had recovered judgment against~~
21 ~~the~~
22 ~~person named in the warrant for the same amount.~~
23 ~~(d) When the amount set forth in a warrant and all costs due the department~~
24 ~~have been paid to it, the department shall issue a satisfaction of the warrant~~
25 ~~and file~~
26 ~~it with the clerk of circuit court. The clerk of circuit court shall immediately~~
27 ~~enter~~
28 ~~a satisfaction of the judgment on the judgment and lien docket. The~~
29 ~~department~~
30 ~~shall send a copy of the satisfaction to the person named in the warrant.~~

19 ~~(e) If the department finds that the interests of the state will not be jeopardized,~~
20 ~~the department may issue a release of any warrant with respect to any~~
 ~~real or~~
21 ~~personal property upon which the warrant is a lien or cloud upon title.~~
 ~~Upon~~
22 ~~presentation to the clerk and payment of the fee for filing the release, the clerk~~
 ~~shall~~
23 ~~enter the release of record. The release is conclusive that the lien or cloud~~
 ~~upon the~~
24 ~~title of the property covered by the release is extinguished.~~

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1 ~~(f) Notwithstanding s. 49.96, at any time after the filing of a warrant, the~~
2 ~~department may commence and maintain a garnishment action as provided~~
3 ~~by ch.~~

4 ~~812 or may use the remedy of attachment as provided by ch. 811 for actions to~~
5 ~~enforce~~

6 ~~a judgment. The place of trial of such an action may be either in Dane County~~
7 ~~or the~~

8 ~~county where the debtor resides and may not be changed from the county in~~
9 ~~which~~

10 ~~that action is commenced, except upon consent of the parties.~~

11 ~~(g) If the department issues an erroneous warrant, the department shall issue~~

12 ~~a notice of withdrawal of the warrant to the clerk of circuit court for the~~
13 ~~county in~~

14 ~~which the warrant is filed. The clerk shall void the warrant and any resulting~~
15 ~~liens.~~

16 ~~(h) If the department arranges a payment schedule with the debtor and the~~

17 ~~debtor complies with the payment schedule, the department may issue a~~
18 ~~notice of~~

19 ~~withdrawal of the warrant to the clerk of circuit court for the county in which~~
20 ~~the~~

21 ~~warrant is filed. If the department issues a notice of withdrawal of the~~
22 ~~warrant, the~~

23 ~~clerk shall void the warrant and the resulting liens.~~

24 ~~(6) PAYMENTS FROM RECOVERED AMOUNTS.~~

25 **SECTION 39. 59.43 (1) (w) of the statutes is created to read:**

26 **59.43 (1) (w) Record and index the documents specified in s. 49.848 (2).**

27 **SECTION 40. 700.24 of the statutes is amended to read:**

28 **700.24 Death of a joint tenant; effect of liens.** A real estate mortgage, a
29 security interest under ch. 409, or a lien under s. 72.86 (2), 1985 stats., or s. 71.91 (5)

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21 (b), ~~or ch. 49 or 779 or rules promulgated under c. 46.286 (7)~~ on or against the interest
22 of a joint tenant does not defeat the right of survivorship in the event of the death
23 of such joint tenant, but the surviving joint tenant or tenants take the interest such
24 deceased joint tenant could have transferred prior to death subject to such mortgage,
25 security interest, or statutory lien.

SECTION 41. 701.065 (1) (b) 1. of the statutes is amended to read:

701.065 (1) (b) 1. The claim is a claim based on tort, on a marital property agreement that is subject to the time limitations under s. 766.58 (13) (b) or (c), on Wisconsin income, franchise, sales, withholding, gift, or death taxes, or on unemployment compensation contributions due or benefits overpaid; a claim for funeral or administrative expenses; a claim of this state under s. 46.27 (7g), 49.496 or, 49.682, or rules promulgated under s. 46.286 (7) 49.849; or a claim of the United States.

SECTION 42. 701.065 (5) of the statutes is created to read:

701.065 (5) CLAIMS OF DEPARTMENT OF HEALTH SERVICES. (a) Definitions. In this subsection:

1. "Department" means the department of health services.

2. "Long-term care program" has the meaning given in s. 49.496 (1) (bk).

(b) Living trusts. 1. Notwithstanding sub. (1) (a), if a settlor or the spouse of a settlor of a living trust

received, at any time before death, any services provided as a benefit under a long-term care program, medical assistance under subch. IV of ch. 49, long-term community support services funded under s. 46.27 (7), or aid under s. 49.68, 49.683, or 49.685, the trustee shall provide written notice to the department within 30 days after the death of the settlor and before any property held in the trust is distributed.

---NOTE: What information should the notice provide to DHS?

....NOTE: Is this okay or do you want to limit this to either a revocable or an irrevocable living trust?

2. After the death of a settlor described in subd. 1., the department may recover under s. 46.27 (7g), 49.496, 49.682, or 49.849, from property held in the living trust immediately before the settlor's death, an amount equal to the medical assistance that is recoverable under s. 49.496 (3) (a), an amount equal to aid under s. 49.68,

Comment [RLK43]: The information on the notice should include demographic information of the settlor and settlor's spouse (name, social security number, date of birth, date of death), information on filing a claim (where, who and the deadline for claims, even though our claim is not barred by the deadline), copy of the trust, documentation to support the value of the trust on the date of death. The notice should be sent by registered/certified mail (similar to s. 859.07).

Also, can we require repayment be made within 90 days of the Department's request for recovery?

Comment [RLK44]: The language is fine as is.

1 49.683, or 49.685 that is recoverable under s. 49.682 (2) (a), or an amount equal to
2 long-term community support services under s. 46.27 that is recoverable under s.
3 46.27 (7g) (c) 1. and that was paid on behalf of the decedent or the decedent's spouse.

4 3. If a trustee under subd. 1. distributes property from the trust before the
5 department makes a request to the trustee for the recovery of any amount specified
6 in subd. 2., the trustee shall provide the department with information about the
7 distributed property and to whom it was distributed or transferred. The department
8 is entitled to recover any amounts specified in subd. 2. from the persons to whom the
9 property was distributed or transferred.

10 (c) Special needs or pooled trusts. 1. Notwithstanding sub. (1) (a), within 30
11 days after the death of a beneficiary under a trust described in 42 USC 1396p (d) (4)
12 (A) or (C), the trustee shall provide written notice to the department and shall repay
13 the department for any medical assistance paid on behalf of the decedent, as required
14 under the terms of the trust.

~~Note: What information should the notice provide to DHS?~~

✓
~~Comment (RLK45): see Comment (RL44)~~

~~Note: Is 30 days sufficient time for the trustee to comply with the repayment
provisions in the trust, or is it only the notice that must be given within 30 days of death?~~

~~Comment (RLK44): repayment should be made
within 30 days of the Department's request for
recovery.~~

15 2. If a trustee under subd. 1. fails to comply with the notice and repayment
16 requirements under subd. 1., the trustee is personally liable to the department for
17 any costs the department incurs in recovering medical assistance amounts paid on
18 behalf of the decedent from property distributed from the trust before any repayment
19 is made and for any recoverable amounts that the department is unable to recover
20 from persons to whom the property was distributed.

21 3. Notwithstanding the terms of the trust, after the death of a beneficiary under
22 a trust described in 42 USC 1396p (d) (4) (C), the trustee may retain up to 30 percent
23 of the balance in the decedent's account, unless the trustee fails to comply with the

1 notice and repayment requirements under subd. 1., in which case the trustee may
2 not retain any of the balance in the decedent's account.

3 SECTION 43. 705.04 (2g) of the statutes is amended to read:

4 705.04 (2g) Notwithstanding subs. (1) and (2), the department of health
5 services may collect, from funds of a decedent that are held by the decedent
6 immediately before death in a joint account or a P.O.D. account, an amount equal to
7 the medical assistance that is recoverable under s. 49.496 (3) (a), an amount equal
8 to aid under s. 49.68, 49.683, or 49.685 that is recoverable under s. 49.682 (2) (a), ~~or~~
9 an amount equal to long-term community support services under s. 46.27 that is
10 recoverable under s. 46.27 (7g) (c) 1. and that was paid on behalf of the decedent or
11 the decedent's spouse ~~or an amount equal to the family care benefit under s. 46.286~~
12 ~~that is recoverable under rules promulgated under s. 46.286 (7) and that was paid~~
13 ~~on behalf of the decedent or the decedent's spouse.~~

14 SECTION 44. 859.02 (2) (a) of the statutes is amended to read:

15 859.02 (2) (a) It is a claim based on tort, on a marital property agreement that
16 is subject to the time limitations under s. 766.58 (13) (b) or (c), on Wisconsin income,
17 franchise, sales, withholding, gift, or death taxes, or on unemployment insurance
18 contributions due or benefits overpaid; a claim for funeral or administrative
19 expenses; a claim of this state under s. 46.27 (7g), 49.496 ~~or~~ 49.682, or rules
20 ~~promulgated under s. 46.286 (7)~~ 49.849; or a claim of the United States; or

21 SECTION 45. 859.07 (2) (a) 3. of the statutes is amended to read:

22 859.07 (2) (a) 3. The decedent or the decedent's spouse received ~~the family care~~
23 ~~benefit under s. 46.286~~ services provided as a benefit under a long-term care
24 program, as defined in s. 49.496 (1) (bk), medical assistance under subch. IV of ch.

1 49, long-term community support services funded under s. 46.27 (7), or aid under s.
2 49.68, 49.683, or 49.685.

3 SECTION 46. 867.01 (3) (am) 4. of the statutes is amended to read:

4 867.01 (3) (am) 4. Whether the decedent or the decedent's spouse received the
5 ~~family care benefit under s. 46.286 services provided as a benefit under a long-term~~
6 ~~care program, as defined in s. 49.496 (1) (bk),~~ medical assistance under subch. IV of
7 ch. 49, long-term community support services funded under s. 46.27 (7) or aid under
8 s. 49.68, 49.683 or 49.685.

9 SECTION 47. 867.01 (3) (d) of the statutes is amended to read:

10 867.01 (3) (d) Notice. The court may hear the matter without notice or order
11 notice to be given under s. 879.03. If the decedent or the decedent's spouse received
12 ~~the family care benefit under s. 46.286 services provided as a benefit under a~~
13 ~~long-term care program, as defined in s. 49.496 (1) (bk),~~ medical assistance under
14 subch. IV of ch. 49, long-term community support services funded under s. 46.27 (7),
15 or aid under s. 49.68, 49.683, or 49.685, the petitioner shall give notice by certified
16 mail to the department of health services as soon as practicable after filing the
17 petition with the court.

18 SECTION 48. 867.02 (2) (am) 6. of the statutes is amended to read:

19 867.02 (2) (am) 6. Whether the decedent or the decedent's spouse received the
20 ~~family care benefit under s. 46.286 services provided as a benefit under a long-term~~
21 ~~care program, as defined in s. 49.496 (1) (bk),~~ medical assistance under subch. IV of
22 ch. 49, long-term community support services funded under s. 46.27 (7), or aid under
23 s. 49.68, 49.683, or 49.685.

24 SECTION 49. 867.03 (1g) (c) of the statutes is amended to read:

1 867.03 (1g) (c) Whether the decedent or the decedent's spouse ever received the
2 ~~family care benefit under s. 46.286 services provided as a benefit under a long-term~~
3 ~~care program, as defined in s. 49.496 (1) (bk),~~ medical assistance under subch. IV of
4 ch. 49, long-term community support services funded under s. 46.27 (7) or aid under
5 s. 49.68, 49.683 or 49.685.

6 SECTION 50. 867.03 (1m) (a) of the statutes is amended to read:

7 867.03 (1m) (a) Whenever an heir, trustee, or person who was guardian of the
8 decedent at the time of the decedent's death intends to transfer a decedent's property
9 by affidavit under sub. (1g) and the decedent or the decedent's spouse ever received
10 ~~the family care benefit under s. 46.286 services provided as a benefit under a~~
11 ~~long-term care program, as defined in s. 49.496 (1) (bk),~~ medical assistance under
12 subch. IV of ch. 49, long-term community support services funded under s. 46.27 (7),
13 or aid under s. 49.68, 49.683, or 49.685, the heir, trustee, or person who was guardian
14 of the decedent at the time of the decedent's death shall give notice to the department
15 of health services of his or her intent. The notice shall include the information in the
16 affidavit under sub. (1g) and the heir, trustee, or person who was guardian of the
17 decedent at the time of the decedent's death shall give the notice by certified mail,
18 return receipt requested.

19 SECTION 51. 867.03 (1m) (b) of the statutes is amended to read:

20 867.03 (1m) (b) An heir, trustee, or person who was guardian of the decedent
21 at the time of the decedent's death who files an affidavit under sub. (1g) that states
22 that the decedent or the decedent's spouse received ~~the family care benefit under s.~~
23 ~~46.286 services provided as a benefit under a long-term care program, as defined in~~
24 ~~s. 49.496 (1) (bk),~~ medical assistance under subch. IV of ch. 49, long-term community
25 support services funded under s. 46.27 (7), or aid under s. 49.68, 49.683, or 49.685

1 shall attach to the affidavit the proof of mail delivery of the notice required under par.
2 (a) showing ~~a the delivery date that is not less than 10 days before the day on which~~
3 ~~the heir, trustee, or person who was guardian of the decedent at the time of the~~
4 ~~decedent's death files the affidavit.~~

5 SECTION 52. 867.03 (2g) of the statutes is renumbered 867.03 (2g) (a) and
6 amended to read:

7 867.03 (2g) (a) By accepting the decedent's property under this section the heir,
8 trustee, or guardian assumes a duty to apply the property transferred for the
9 payment of obligations according to priorities established under s. 859.25 and to
10 distribute any balance to those persons designated in the appropriate governing
11 instrument, as defined in s. 854.01, of the decedent or if there is no governing
12 instrument, according to the rules of intestate succession under ch. 852, subject to
13 par. (b). An heir or guardian may publish a notice to creditors in the same manner
14 and with the same effect as a trustee under s. 701.065. This ~~subsection~~ paragraph
15 does not prohibit any appropriate person from requesting administration of the
16 decedent's estate under s. 856.07 or ch. 865.

17 SECTION 53. 867.03 (2g) (b) of the statutes is created to read:

18 867.03 (2g) (b) Property transferred under this section to or by an heir, trustee,
19 or guardian is subject to the right of the department of health services to recover
20 under s. 46.27 (7g), 49.496, 49.682, or 49.849 an amount equal to the medical
21 assistance that is recoverable under s. 49.496 (3) (a), an amount equal to aid under
22 s. 49.68, 49.683, or 49.685 that is recoverable under s. 49.682 (2) (a), or an amount
23 equal to long-term community support services under s. 46.27 that is recoverable
24 under s. 46.27 (7g) (c) 1. and that was paid on behalf of the decedent or the decedent's
25 spouse. Upon request, the heir, trustee, or guardian shall provide to the department

1 of health services information about any of the decedent's property that the heir,
2 trustee, or guardian has distributed and information about the persons to whom the
3 property was distributed.

4 SECTION 54. 867.035 (title) of the statutes is repealed.

5 SECTION 55. 867.035 (1) (a) (intro.) of the statutes is renumbered 49.849 (2) (a)
6 (intro.) and amended to read:

7 49.849 (2) (a) (intro.) Subject to par. (bm) (b), the department of health services
8 may collect from the property of a decedent, including funds of a decedent that are
9 held by the decedent immediately before death in a joint account or a P.O.D. account,
10 by affidavit under sub. (2) (3) (b) or by lien under sub. (2m) (4) an amount equal to
11 the medical assistance that is recoverable under s. 49.496 (3) (a), the long-term
12 community support services under s. 46.27 that is recoverable under s. 46.27 (7g) (c)
13 1., the family care benefit that is recoverable under rules promulgated under s.
14 46.286 (7), or the aid under s. 49.68, 49.683, or 49.685 that is recoverable under s.
15 49.682 (2) (a), and that was paid on behalf of the decedent or the decedent's spouse,
16 if all of the following conditions are satisfied:

17 SECTION 56. 867.035 (1) (a) 1. of the statutes is renumbered 49.849 (2) (a) 1.

----NOTE: I have retained this provision. Don't you need to know whether there will
be an estate in which to file a claim?

18 SECTION 57. 867.035 (1) (a) 2. of the statutes is renumbered 49.849 (2) (a) 2. and
19 amended to read:

20 49.849 (2) (a) 2. The decedent died after September 30, 1991 the date that is
21 90 days after the effective date of this subdivision [LRB inserts date].

22 SECTION 58. 867.035 (1) (a) 3. of the statutes is renumbered 49.849 (2) (a) 3.

23 SECTION 59. 867.035 (1) (a) 4. of the statutes is repealed.

✓
Comment [RLK47]: Remove/repeal the 20 day requirement. We will be using our affidavit on non-probate assets where there will be no estate and in response to notice/affidavits we receive by affiants under s. 867.03 (transferring assets without estate administration).

SECTION 60. 867.035 (1) (bm) of the statutes is renumbered 49.849 (2) (b), and 49.849 (2) (b) (intro.), as renumbered, is amended to read:

49.849 (2) (b) (intro.) The department of health services shall reduce the amount of its recovery under par. (a) by up to the amount specified in s. 861.33 (2) if necessary to allow the decedent's heirs or beneficiaries under the decedent's will to retain the following personal property of the decedent:

SECTION 61. 867.035 (2) of the statutes is renumbered 49.849 (3) (b) and amended to read:

49.849 (3) (b) A person who possesses or receives property of a decedent shall transmit the property to the department of health services, if the conditions in sub. ~~(1) (a) 1. to 4.~~ (2) (a) 1. to 3. are satisfied, upon receipt of an affidavit by a person designated by the secretary of health services to administer this section showing that the department paid on behalf of the decedent or the decedent's spouse recoverable benefits specified in sub. ~~(4)~~ (2) (a). Upon transmittal, the person is released from any obligation to other creditors or heirs of the decedent.

—Note: Would you prefer that the affidavit in this process be changed to a statement of claim?

Comment [RLK40]: We print leaving it as a blank.

SECTION 62. 867.035 (2m) of the statutes is renumbered 49.849 (4), and 49.849 (4) (a) (intro.) and (b), as renumbered, are amended to read:

49.849 (4) (a) (intro.) If the conditions in sub. (1) ~~(a) 1., 2., and 4.~~ (2) (a) 1. and 2. are satisfied, the department of health services shall have a lien in the amount that it may recover under sub. (1) ~~(2) (a)~~ (2) (a) on any interest in the decedent's real property, including a home, as defined

in s. 49.496 (1) (b), transferred under s. 867.03 (1g). The department may record the lien in the office of the register of deeds of the county in which the real property is

SECTION 62

1 located. The department may enforce the lien by foreclosure in the same manner as
2 a mortgage on real property, unless any of the following is alive:

----NOTE: Should the reference to s. 867.03 (1g) be removed in both this and the
next provision so that the department would have liens on the home and any other real
property, regardless of whether they were transferred under s. 867.03 (1g)?

3 (b) If the conditions in sub. ~~(1) (a) 1. to 4.~~ (2) (a) 1. to 3. are satisfied, the
4 department of health services shall have a lien in the amount that it may recover
5 under sub. ~~(1) (2) (a)~~ on any interest in any real property of the decedent transferred
6 under s. 867.03 (1g). The department may record the lien in the office of the register
7 of deeds of the county in which the real property is located and may enforce the lien
8 by foreclosure in the same manner as a mortgage on real property.

----NOTE: See my previous NOTE.

9 SECTION 63. 867.035 (3) of the statutes is renumbered 49.849 (5) and amended
10 to read:

11 49.849 (5) OTHER VALID CLAIMS. If a person has a valid claim against the
12 ~~decedent's estate~~ property of the decedent that would have a higher priority under
13 s. 859.25 (1) if the ~~estate were administered~~ property were subject to administration
14 than the department of health services would have under s. 859.25 (1) (e) and the
15 person demands payment in writing within one year of the date on which the
16 property was transmitted to the department, the department shall pay to the person
17 the value of the property collected under sub. ~~(2) (3)~~ or the amount of the claim,
18 whichever is less. The department may authorize any person who possesses
19 property of the decedent to honor higher priority claims with the decedent's property
20 before transmitting property to the department.

21 SECTION 64. 867.035 (4) of the statutes is renumbered 49.849 (6) (a) and
22 amended to read:

Comment [RLK49]: We would be placing liens
against all real property when there is a surviving
spouse or minor or disabled child. We can't enforce
on any real property when there is a spouse or
minor or disabled child.

Also, add or cross reference provisions of 49.848 (5)
(b) and (c) regarding when a surviving spouse
disabled child sells property.

1 49.849 (6) (a) From the appropriation under s. 20.435 (4) (im), with respect to
2 funds collected by the department under sub. (4) (2) related to medical assistance
3 paid on behalf of the decedent or the decedent's spouse, the department of health
4 services shall pay claims under sub. (3) (5), shall pay to the federal government from
5 the amount recovered under this section and not paid out as claims under sub. (3)
6 (5) an amount equal to the amount of federal funds used to pay the benefits recovered
7 under this section and shall spend the remainder of the amount recovered under this
8 section for medical assistance benefits under subch. IV of ch. 49.

9 SECTION 65. 867.035 (4m) of the statutes is renumbered 49.849 (6) (b) and
10 amended to read:

11 49.849 (6) (b) From the appropriation under s. 20.435 (7) (im), with respect to
12 funds collected by the department under sub. (4) (2) related to long-term community
13 support services funded under s. 46.27 (7) paid on behalf of the decedent or the
14 decedent's spouse, the department of health services shall pay claims under sub. (3)
15 (5) and shall spend the remainder of the funds recovered under this section for
16 long-term community support services funded under s. 46.27 (7).

17 SECTION 66. 867.035 (5) of the statutes is renumbered 49.849 (7) and amended
18 to read:

19 49.849 (7) RULES FOR HARDSHIP WAIVER. The department of health services shall
20 promulgate rules establishing standards to determine whether the application of
21 this section would work an undue hardship in individual cases. If the department
22 of health services determines that the application of this section would work an
23 undue hardship in a particular case, the department shall waive the application of
24 this section in that case. This subsection does not apply with respect to collecting
25 from the property of a deceased nonrecipient surviving spouse.

****NOTL Initial applicability and effective date provisions are not included in this version of the draft.

1

(END)

Kahler, Pam

From: Iwata, Yuko - DOA <Yuko.Iwata@wisconsin.gov>
Sent: Wednesday, January 16, 2013 8:15 AM
To: Kahler, Pam; Dodge, Tamara
Cc: Gauger, Michelle C - DOA
Subject: FW: LRB comments
Attachments: 13-0617_P2 - DHS comments 011513.docx; mn dhs er 09-21-11C.pdf; Minn 256B.15 estate recovery.pdf; Minn 519.05 spouse liability.pdf; 30 year limit on liens.pdf

Pam and Tami,

Below you find DHS' response to your draft on estate recovery. If you have any questions please let me know.

Thanks,

Yuko Iwata

Executive Policy and Budget Analyst
Division of Executive Budget and Finance
Department of Administration
(608) 267 – 7980

From: Rosen, Lara K - DHS
Sent: Tuesday, January 15, 2013 4:29 PM
To: Iwata, Yuko - DOA
Cc: Gauger, Michelle C - DOA; Megna, Richard H - DHS; Forsaith, Andrew C - DHS; Wasilewski, Daniel L - DHS; Garza, Jesus G - DHS; Emmerton, Kathleen M - DHS; Cunningham, Curtis J - DHS; Willing, Krista E - DHS
Subject: FW: LRB comments

Hi Yuko,

I have attached a Word version of the statutory language draft with DHS comments and edits in tracked changes. A couple of warnings: The formatting and page numbers are a little off, and, due to the nature of track changes, it may be difficult to identify all edits if printing in black and white.

In addition, below are program expert responses to address some of the concerns and questions LRB posed in the drafters' notes.

Thanks, and let me know if you have questions. I'd be happy to schedule a meeting with LRB to address any remaining issues.
Lara

Defining property – We will defer to LRB's judgment here. However, we want to make sure in particular that the Department would be able to collect on the death benefit of life insurance (whether whole or term life) – there is some concern that if we don't define it, it may be difficult to consider the benefit as property of the recipient (especially a term death benefit). There is a similar concern regarding annuities, which we would want to address.

Regarding some of the concerns about marital property and doctrine of necessities, etc. - While Minnesota is not a marital property state, its law limits an estate recovery claim in the estate of non-recipient surviving spouse to the value of property in the estate that was marital property or jointly owned property at any time during the marriage (not just 5 years prior to application) See 256B.15, especially Subdivision 1a.(c) and (d), which defines "other arrangement" as being inter-spousal transfers or, essentially,

reclassification of marital property, Subdivision 2. and Subdivision 2a. (b) and (c). Minnesota also makes spouses jointly and severally liable for estate recovery claims under 256B.15. See 519.05 (a). Their Medicaid State Plan was approved. See Minnesota Department of Human Services Bulletin #09-21-11C. If the common law doctrine of necessities may not currently fully support our recovery of marital property assets in Wisconsin, perhaps we could do something similar to Minnesota and define in statute (perhaps in s. 766.55) that estate recovery claims are an obligation to the spouse (regardless of the common law doctrine of necessities) that may be settled with any property that was marital property five years prior to the recipient spouse applying for public assistance. We want to stave off any potential litigation by being crystal clear on how we have the authority to recover from surviving spouses. The legislature can ultimately decide whether it should be included or not. I've attached the referenced Minnesota laws and bulletin.

✓ The issue with the statute of limitations on liens is that we've had situations in the past where attorneys argued our lien only lasted 10 years, rather than 30 years like a mortgage. I believe we settled the last case instead of litigating it. Attached is a document pertaining to that case (recipient info blacked out) which has an email and then documents laying out the issue.

Comments regarding the need for defining date of death are contained in the revised document of our comments so far.

* * * * *

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* * * * *

Kahler, Pam

From: Iwata, Yuko - DOA <Yuko.Iwata@wisconsin.gov>
Sent: Thursday, January 17, 2013 2:34 PM
To: Kahler, Pam
Cc: Gauger, Michelle C - DOA
Subject: FW: LRB comments

Hi Pam,

See DHS' response below.

Thanks,

Yuko Iwata
Executive Policy and Budget Analyst
Division of Executive Budget and Finance
Department of Administration
(608) 267 – 7980

From: Rosen, Lara K - DHS
Sent: Thursday, January 17, 2013 2:18 PM
To: Iwata, Yuko - DOA
Cc: Wasilewski, Daniel L - DHS; Emmerton, Kathleen M - DHS; Garza, Jesus G - DHS; Cunningham, Curtis J - DHS; Willing, Krista E - DHS; Gauger, Michelle C - DOA
Subject: RE: LRB comments

Hi Yuko,

Here is our response to Pam's question regarding the 5-year marital property issue – hopefully this helps clarify things.

We want to recover any property owned by the recipient at the recipient's death. We also want to recovery any property that was at some time considered marital property within five years before application, if that property was owned by either spouse at the time of application and continued to be owned by either spouse up until the time of the recipient's death. In addition, we want to recover any property acquired after the time of application that was at some time considered marital property, if that property continued to be owned by either spouse up until the time of the recipient's death.

Alternatively stated, any property solely owned by the recipient at the recipient's death and any property owned by the recipient or the recipient's spouse at the time of the recipient's death that was at one time marital property at any time during the period of the recipient's eligibility for public assistance and during the period of five years prior to the recipient's application for public assistance.

Thanks, and let me know if you or LRB have any questions.
Lara

From: Iwata, Yuko - DOA
Sent: Thursday, January 17, 2013 12:51 PM
To: Rosen, Lara K - DHS
Subject: FW: LRB comments

An additional comment from Pam. Thanks, Yuko

From: Kahler, Pam [<mailto:Pam.Kahler@legis.wisconsin.gov>]
Sent: Thursday, January 17, 2013 12:48 PM
To: Iwata, Yuko - DOA
Subject: RE: LRB comments

Yuko,

You may want to run this by them. I think what they may be saying is that DHS can recover against: 1) property held by the individual (recipient) and 2) property held by the recipient's spouse that was marital property with the recipient at any time during the 5-year period before application (by the recipient).

From: Iwata, Yuko - DOA [<mailto:Yuko.Iwata@wisconsin.gov>]
Sent: Thursday, January 17, 2013 12:29 PM
To: Kahler, Pam
Subject: RE: LRB comments

Hi Pam,

OK, I will forward your questions to DHS. I will keep you posted.

Thanks for your comments,

Yuko Iwata
Executive Policy and Budget Analyst
Division of Executive Budget and Finance
Department of Administration
(608) 267 – 7980

From: Kahler, Pam [<mailto:Pam.Kahler@legis.wisconsin.gov>]
Sent: Thursday, January 17, 2013 12:27 PM
To: Iwata, Yuko - DOA
Subject: RE: LRB comments

Yuko,

I'm working my way through these comments and still need some clarification on the 5-year marital property issue. The comment is "anything that has been marital property from 5 years prior to application to the present is subject to recovery." This language can be interpreted in many different ways. Does it mean anything that was marital property at any time during the 5-year period before application? Anything that is marital property at the present time (which is when?) (or at the time of application) as long as it has been marital property for at least 5 years before now (which is when?) (or application) or as long as it was marital property at some time during the 5-year period before application? Can this concept be explained in a clearer way? I'm sorry, but the more I look at it the less clear it becomes.

Pam

From: Iwata, Yuko - DOA [<mailto:Yuko.Iwata@wisconsin.gov>]
Sent: Wednesday, January 16, 2013 8:15 AM
To: Kahler, Pam; Dodge, Tamara
Cc: Gauger, Michelle C - DOA
Subject: FW: LRB comments

Pam and Tami,

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Thanks,

Yuko Iwata
Executive Policy and Budget Analyst
Division of Executive Budget and Finance
Department of Administration
(608) 267 – 7980

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Cc: Gauger, Michelle C - DOA; Megna, Richard H - DHS; Forsaith, Andrew C - DHS; Wasilewski, Daniel L - DHS; Garza, Jesus G - DHS; Emmerton, Kathleen M - DHS; Cunningham, Curtis J - DHS; Willing, Krista E - DHS
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necessaries) that may be settled with any property that was marital property five years prior to the recipient spouse applying for public assistance. We want to stave off any potential litigation by being crystal clear on how we have the authority to recover from surviving spouses. The legislature can ultimately decide whether it should be included or not. I've attached the referenced Minnesota laws and bulletin.

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* * * * *

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* * * * *

Wasilewski, Daniel L - DHS

From: Wasilewski, Daniel L - DHS <Daniel.Wasilewski@dhs.wisconsin.gov>
Sent: Friday, January 11, 2013 10:08 AM
To: Wasilewski, Daniel L - DHS
Cc: Wasilewski, Daniel L - DHS
Subject: FW: [REDACTED] estates

-----Original Message-----

From: Emmerton, Kathleen M - DHS [mailto:Kathleen.Emmerton@dhs.wisconsin.gov];
Sent: 7/8/2009 4:21:03 PM
To: Wasilewski, Daniel L - DHS [mailto:Daniel.Wasilewski@dhs.wisconsin.gov];
Subject: FW: [REDACTED] estates

Hi Dan -

See Deb Remington's questions below - what, if anything, do you think? I don't know much other than Peggy took this stance (30 years). Do you have an opinion or just leave it to them?

Kathy Emmerton, Chief
Estate and Casualty Recovery Section
Bureau of Program Integrity
(608) 261-7831
kathleen.emmerton@wi.gov

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From: Garza, Jesus G - DHS
Sent: Wednesday, July 08, 2009 3:26 PM
To: Emmerton, Kathleen M - DHS
Cc: Garza, Jesus G - DHS
Subject: FW: [REDACTED] estates

Kathy:

Below is a request from Ass't. Atty. Gen. Debbie Remington who is handling a couple of the ERP cases for collection. I would like to meet with you in the next couple of days to discuss the procedural aspects of MA liens before I meet with Debbie.

I'm available tomorrow (09 JUL) after 2:30 p.m., or Monday (13 JUL) after 1:30 p.m. Does either of these dates/times work for you? jg

Very truly yours,

Jesús ("Jesse") G.Q. Garza, Esq.
DHS/OLC
1 W WILSON ST RM 651
PO BOX 7850
MADISON WI 53707-7850

Tel.: (608) 266-9202

Fax: (608) 267-1434

* NOTICE * NOTICE * NOTICE *

This e-mail and any attachments may contain confidential information and/or information protected by the attorney-client privilege. Use and further disclosure of the information by the recipient must be consistent with applicable laws, regulations, and agreements. If you received this e-mail in error, please notify me; delete this e-mail; and do not use, disclose, or store the information it contains.

From: Remington, Debra L. [mailto:RemingtonDL@DOJ.STATE.WI.US]
Sent: Wednesday, July 08, 2009 12:52 PM
To: Garza, Jesus G - DHS
Subject: [REDACTED] estates

Jesse,

I have reviewed the materials DHS sent over with its referral, and I am hoping to engage a law clerk to help me better understand medical assistance liens, particularly how long they can be enforced. I am not sold on their having a life of 30 years, though the law clerk who wrote a memo for Peggy a few years ago makes a good argument. Would you like to meet to discuss the 30-year argument? Have you used it before, and succeeded? I would like to send a letter to the attorney, [REDACTED] who handled the estate of [REDACTED] and the closing on the sale of her real estate, but I would like to be a little more confident in my argument that we have 30 years to enforce our lien.

If the statute of limitation were 10 years (because there's no other statute of limitation that applies), I assume that the time would start clicking on the date that the child caretaker dies, yes? If the clock starts ticking when the lien is put in place (whether it be a 6-year, 10-year or 30-year clock), when [REDACTED] entered the nursing home, then the lien could have expired while [REDACTED] and/or her daughter were still alive. In other words, should the SOL start when the claim can first be enforced, or when it is filed?

Thanks for your help. If I can get a law clerk to help me, perhaps the law clerk could meet with us, as well.

Debbie

LAW CLERK ASSIGNMENT FORM

Today's date: September 12, 2005

Name of case: Estate of [REDACTED]

Name and location of assigned attorney: Peggy Wichmann Rm. 465

Brief description of case or project: DHFS has a lien on a home that was sold. The lien predated the sale. The lien was not paid when the home sold. The title company withheld the funds and claims that the state's lien expired. I want to start a civil action to force the title co to pay us the funds. The question is whether we fall within the statutes of limitations.

Due dates: Before February 1, 2006

Detailed description of law clerk's assignment and responsibilities (including preferred approaches to research, suggested references, particular questions or issues to be addressed, etc.

The title company says that the state's lien is only valid for 10 years based on s. 893.87. Our lien was recorded on March 21, 1994. The sale date was September 15, 2004. To enforce our lien we would have to foreclose on it against the current owners. Therefore I have to make sure we have a cause of action.

My preferred line of reasoning is that we fall under s. 893.33(2) and (5), which deals with real estate interests and would make our liens good for 30 years. Our liens are to be foreclosed in the same manner as a mortgage. s. 49.496(2)(g). I think this statute is more specific to my situation.

My alternative/additional argument is that our cause of action does not arise until the property is sold. Many of our liens have restrictions on them and cannot be enforced until an act occurs. Does our cause of action first arise when the act has occurred? If yes, then in this case we would fall within even the more limited 10 year time frame because the final act required before we could enforce the lien occurred on August 14, 2001.

My request is to have these issues researched. I want to start a foreclosure action to enforce our lien. The case would go against the current owners. The owners then would have recourse against the title co. We cannot go after the title company because we have no legal relationship. Since this case could set a precedent I would like to make sure of my legal footing.

The research would primarily be in Wisconsin statutes and Wisconsin case law. There may be secondary resources that could be used.

MEMO

To: Peggy Wichmann
From: Mia Haessly
Re: [REDACTED]
Date: January 13, 2006

Question: Is DHFS barred by the statute of limitations from starting a civil action to force the title company to pay the funds (*i.e.* foreclose on the current owners)?

Short Answer: No. Because this is a lien on real estate, a 30-year statute of limitations applies.

Facts:

- DHFS has a lien on a home, recorded March 21, 1994.
- The home was sold on September 15, 2004, and the lien was not paid at time of sale.
- The title company withheld funds at time of sale and claims the lien has expired.

Discussion

I. Statutory Interpretation

Wisconsin Statutes section 893.87 is the general limitation of action statute, used when no other limitation applies. The language of the statute reads, "[a]ny action in favor of the state, *if no other limitation is prescribed in this chapter*, shall be commenced within 10 years after the cause of action accrues or be barred" (emphasis added).

The Wisconsin Supreme Court reaffirmed this use of section 893.87 in its State v. Holland Plastics Co. decision. It stated, "[w]e conclude that sec. 893.18(6), Stats. 1971, (now sec. 893.87 1981-82), sets a ten-year limitation for actions by the state only where the action is of such a type that it does not fall under any other of the limitations set out in the limitations chapter of the statutes." 111 Wis. 2d 497, 504, 331 N.W.2d 320 (Wis. 1983)

The action in the present case, however, is of a type that falls under another limitation chapter of the statute, specifically Wisconsin Statutes sections 893.33(2) and (5), which limits actions concerning real estate. Section 893.33(5) reads, in pertinent part, "This section bars all claims to an interest in real property, whether rights based on [inter alia] *mortgage liens*,...unless within the 30-year period provided by sub. (2) there has been recorded in the office of the register of deeds some instrument expressly referring to the existence of the claim, or a notice pursuant to this section." (emphasis added).

The Wisconsin Court of Appeals addressed the application of this section in its 2000 City of Stevens Point v. Pliska decision. In that case, the city of Stevens Point had accepted a mortgage on defendant's property as payment for fines. The court states at paragraph 5, "Pliska argues that the foreclosure action should be barred by the six-year statute of limitations for contracts set forth in Wis. Stat. § 893.43 because the mortgage represented a promise of payment in lieu of a bond under Wis. Stat. § 66.12(2). However, Wis. Stat. § 893.33(2) sets forth a statute of limitation of thirty years for actions "affecting the possession or title of any real estate." We are satisfied this is the section which applies to the City's action to foreclose on Pliska's mortgage, regardless of the nature of the underlying debt which the mortgage secured. The City initiated its suit well within the applicable thirty-year statute of limitations." 2000 WI App 233, ¶ 5, 239 Wis. 2d 235.

Therefore, from the plain language of the statute and applicable case law, Wis. Stat. §893.33 is the appropriate limitation statute.

II. AG Opinion

In a 1993 opinion regarding the construction of a department of revenue tax lien statute, the Attorney General of Wisconsin wrote "[c]lear and unambiguous language found in a statute must be given effect. *In Interest of F.E.W.*, 143 Wis. 2d 856, 861, 422 N.W.2d 893 (Ct. App. 1988). And each part of a statute should be given force so that no language will be rendered superfluous. *State ex rel. Taylor v. Linse*, 161 Wis. 2d 719, 723, 469 N.W.2d 201 (Ct. App. 1991)." 81 Op. Att'y Gen. 41, 43 (1993)

As a footnote, the Attorney General added, "Section 893.33, another statute to which you refer in your opinion request, does not, strictly speaking, affect the duration of a lien. It precludes the assertion of an otherwise valid lien against a bona fide purchaser for value of real estate or the purchaser's successor in title after thirty years unless a written instrument or notice is recorded within the thirty year period." 81 Op. Att'y Gen. 41, 41 (1993) – Footnote

Following the Attorney General's logic, the language of Wis. Stat. §893.33 would be superfluous if Wis. Stat. §893.87 were construed to apply to actions concerning real estate. Logically, the latter statute is the default statute, used only when more specific statutes do not apply.

Conclusion

This case involves an interest in real estate. The conditions under which the interest arose are immaterial to the question of limitation on actions. DHFS may initiate an action to enforce the lien because it is still within the 30-year period.

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*2000 WI App 233; 239 Wis. 2d 235;
619 N.W.2d 308; 2000 Wisc. App. LEXIS 949, **

City of Stevens Point, Plaintiff-Respondent, v. John Pliska, Defendant-Appellant.

No. 99-3238

COURT OF APPEALS OF WISCONSIN, DISTRICT FOUR

2000 WI App 233; 239 Wis. 2d 235; 619 N.W.2d 308; 2000 Wisc. App. LEXIS 949

September 28, 2000, Decided
September 28, 2000, Filed

NOTICE: [*1] Pursuant to WIS. STAT. RULE 809.23(3) of Appellate Procedure, an unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority except to support a claim of res judicata, collateral estoppel or law of the case.

PRIOR HISTORY: APPEAL from a judgment of the circuit court for Portage County: FREDERIC W. FLEISHAUER, Judge.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed the decision of the Circuit Court for Portage County (Wisconsin) granting summary judgment to plaintiff, and foreclosing on a mortgage defendant had granted to plaintiff in lieu of a bond pending his prior appeal of several building code violations, in a suit to determine whether plaintiff's foreclosure action was barred by the statute of limitations and laches.


OVERVIEW: Defendant was found guilty of several building code violations, and a series of judgments were entered against him assessing forfeitures in the amount of \$ 8,631. Defendant appealed these judgments, and in lieu of a bond on appeal, he granted plaintiff a mortgage on property which he owned. Following defendant's failure to pay the forfeitures, plaintiff commenced a foreclosure action. The trial court granted summary judgment to plaintiff and foreclosed on defendant's mortgage. Defendant appealed. The appellate court affirmed the trial court's decision for the following reasons. First, the applicable statute of limitations was 30 years (as set forth in Wis. Stat. § 893.33(2) (1997-98)), not 6 years, as defendant had suggested. Thus, plaintiff's foreclosure action was well within the applicable statute of limitations. Second, defendant failed to establish a factual basis for the prejudice element of laches. Third, plaintiff could properly consider defendant in default on the underlying debt because the forfeitures were not paid by the standard time allowed to satisfy judgments.


OUTCOME: The grant of summary judgment to plaintiff, and the foreclosure of defendant's mortgage, were affirmed. Plaintiff's foreclosure action fell within the applicable 30-year statute of limitations; defendant did not show a factual basis for the prejudice


element of laches; and, by operation of law, the forfeitures were due in full as soon as the appeal process was completed and the underlying judgments became final.


CORE TERMS: mortgage, forfeiture, default, statute of limitations, foreclosure action, laches, summary judgment, mortgaged property, mortgagee, join, building code, foreclosure


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HN1  The appellate court applies the same summary judgment methodology as that employed by the circuit court. [Wis. Stat. § 802.08](#) (1997-98). The appellate court first examines the complaint to determine whether it states a claim, and then reviews the answer to determine whether it joins an issue. If the appellate court concludes that the pleadings are sufficient to join an issue of law or fact, the appellate court examines the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. If they do, the appellate court looks to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. [More Like This Headnote](#)


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HN2  [Wis. Stat. § 893.33\(2\)](#) (1997-98) sets forth a statute of limitation of 30 years for actions affecting the possession or title of any real estate. [More Like This Headnote](#)


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HN3  The doctrine of laches may bar an action when there has been unreasonable delay, knowledge of the course of events and acquiescence therein, and prejudice to the party asserting the defense. [More Like This Headnote](#)

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HN4  A mortgagee can be prejudiced by having to pay considerably more for his default than he would have had to do if a foreclosure action had been more timely brought. [More Like This Headnote](#)

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HN5  By operation of law, forfeitures are due in full as soon as the appeal process is completed and the underlying judgments become final. [Wis. Stat. § 66.12\(2\)](#) (1997-98). [More Like This Headnote](#)

JUDGES: Before Eich, Roggensack and Dillon, JJ. n1

n1 Circuit Judge Daniel T. Dillon is sitting by special assignment pursuant to the Judicial Exchange Program.

OPINION: P1. PER CURIAM. John Pliska appeals from a judgment of foreclosure on a mortgage which he had granted to the City of Stevens Point in lieu of a bond pending his prior appeal of several building code violations. He claims the foreclosure action was barred by the statute of limitations and laches and that the record fails to show he was in default on the mortgage. For the reasons discussed below, we affirm.

BACKGROUND

P2. Pliska was convicted of several building code violations in 1988, and a series of judgments were entered against him assessing forfeitures in the amount of \$ 8,631. He appealed the decisions to this court. In lieu of a bond on appeal, he granted the City of Stevens Point a mortgage on property which he owned. The mortgage was duly recorded with [*2] the Portage County Clerk of Courts.

P3. The forfeiture judgments were affirmed on July 13, 1989. Pliska, however, never paid the forfeitures. The City sent Pliska letters in May and July of 1998, attempting to collect the amount outstanding on the debts secured by the mortgage. When Pliska still did not pay, the City commenced a foreclosure action. The trial court granted the City summary judgment, and Pliska appeals.

STANDARD OF REVIEW

P4. ^{HN1} We apply the same summary judgment methodology as that employed by the circuit court. See Wis. Stat. § 802.08 (1997-98); n2 State v. Dunn, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue. See *id.* If we conclude that the pleadings are sufficient to join an issue of law or fact, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. See *id.* If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. See *id.* [*3]

----- Footnotes -----

n2 All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

----- End Footnotes -----

ANALYSIS

Statute of Limitations

P5. Pliska argues that the foreclosure action should be barred by the six-year statute of limitations for contracts set forth in Wis. Stat. § 893.43 because the mortgage represented a promise of payment in lieu of a bond under Wis. Stat. § 66.12(2). However, ^{HN2} Wis. Stat. § 893.33(2) sets forth a statute of limitation of thirty years for actions "affecting the possession or title of any real estate." We are satisfied this is the section which applies to the City's action to foreclose on Pliska's mortgage, regardless of the nature of the underlying debt which the mortgage secured. The City initiated its suit well within the applicable thirty-year statute of limitations.

Laches

P6. ^{HN3} The doctrine of laches may bar an action when there has been "unreasonable delay, knowledge of the course of events and acquiescence therein, and prejudice to the party asserting the defense. [*4] " Sawyer v. Midelfort, 217 Wis. 2d 795, 806, 579 N.W.2d 268 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 124, 595 N.W.2d 423 (1999) (citation omitted). Here, the City had knowledge of all of the events which it alleges established Pliska's default on the mortgage, and it has provided no reasonable explanation of why it delayed its prosecution for ten years following the appellate decision affirming the forfeitures. It contends, however, that Pliska has failed to establish a factual dispute on the issue of prejudice.

P7. Pliska claims prejudice from the fact that both the interest due on his forfeiture judgments and the value of his mortgaged property have significantly increased during the delay. However, while we agree with the general proposition that ^{HN4} a mortgagee could be prejudiced by having to pay considerably more for his default than he would have had to do if a foreclosure action been more timely brought, see Mutual Fed. Sav. & Loan Ass'n v. American Med. Servs., Inc., 66 Wis. 2d 210, 223 N.W.2d 921 (1974), that is not the situation here because the City expressly waived any claim to interest before the trial court. [*5] Accordingly, the trial court did not include any interest amount in the calculation of the amount owing to the City set forth in the foreclosure judgment. Since the amount of the debt the City claimed did not increase, any increase in the value of the mortgaged property would accrue to Pliska's benefit. In sum, we conclude that Pliska failed to establish a factual basis for the prejudice element of laches. n3

----- Footnotes -----

n3 In light of our conclusion that the City's waiver eliminated the relevance of any increase in the amount of interest due or the value of the property, we need not address whether Pliska's affidavits were in proper form.

----- End Footnotes -----

Default

P8. Pliska concedes that he never paid the forfeitures. However, he claims the City cannot show he was in default because there is no language in either the mortgage or the underlying forfeiture judgment specifying the date on which his payment was due or the amount of time after payment was due which would constitute default. We disagree.

P9. The mortgage was executed on [*6] a standard, fill-in-the blank form provided by the State Bar. It stated that it was "to secure payment of judgments entered in Portage County Case Nos.: 87FM-1372, 87FM-1373 & 88FM-27" in the amount of \$ 8,631. It also provided, in relevant part:

4. DEFAULT AND REMEDIES. Mortgagor agrees that time is of the essence with respect to payment of principal and interest when due and in the performance of any of the covenants and promises of the Mortgagor contained herein or in the note(s) secured hereby. In the event of default, Mortgagee may, at his option and subject to the

notice provisions of this Mortgage, declare the whole amount of the unpaid principal and accrued interest due and payable and collect it in a suit at law or by foreclosure ...

Because the underlying debt arose from judgments, rather than a note executed to repay a loan, payments were not due in installments subject to acceleration upon default. Rather, ^{HNS}by operation of law, the forfeitures were due in full as soon as the appeal process was completed and the underlying judgments became final. See Wis. Stat. § 66.12(2). It was not necessary to specify a date by which payment was [*7] to be made. The City could properly consider Pliska in default on the underlying debt when the forfeitures were not paid by the standard time allowed to satisfy judgments.

By the Court. - Judgment affirmed.

This opinion will not be published. See Wis. Stat. Rule 809.23(1)(b)5.

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